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No. 82-540

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF MISSISSIPPI, *Appellant*,

v.

WILLIAM FRENCH SMITH, *Appellee*
and HENRY J. KIRKSEY, *et al.*, *Appellees*.

On Appeal From The United States District Court For The District Of Columbia

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS

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Appellant, the State of Mississippi, by its attorneys and pursuant to Supreme Court Rule 16.4 respectfully requests the Court to deny the motions of the Appellees to dismiss, and to grant the Appellant's request for an order noting probable jurisdiction of this appeal.

The Jurisdictional Language Of Section 5 Encompasses A Direct Appeal From An Order Denying A Motion For Summary Judgment Where The Order Decides A Governing Issuing Of Law

A. Section 5 of the Voting Rights Act provides that "any appeal shall be to the Supreme Court." 42 U.S.C. § 1973c. In interpreting the parallel language in Section 4 of the Act, 42 U.S.C. § 1973b, this Court noted that the jurisdictional provision "does not incorporate or refer to

§ 1253" and that it therefore should be interpreted in light of "the broader purport of Congress" in enacting the Voting Rights Act. *N.A.A.C.P.* v. *New York*, 413 U.S. 345, 356 (1973).

The clear intent of Congress in drafting the unrestricted "any appeal" provisions of the Act was to expedite litigation so that "voting restraints on account of race or color should be removed as quickly as possible." 413 U.S. at 354. Moreover, the Section 5 mechanism, insofar as it prohibits a sovereign state from implementing its own legislation unless and until the legislation is approved by a federal court, is so unprecedented that the covered states' right to uniform and swift adjudication must be scrupulously guarded. *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969).

In *Allen*, the Court commented on the unique nature of Section 5 litigation.

> In drafting § 5 Congress apparently concluded that if the governing authorities of a State differ with the Attorney General of the United States concerning the purpose or effect of a change in voting procedures, it is inappropriate to have that difference resolved by a single district judge. *Allen* at 563.

The *Allen* Court did not read the limiting provisions of other three-judge court statutes into Section 5. "The requirement [of three judges] applies to [Section 5] suits for declaratory judgment as well as for injunctions. And the three-judge courts do not appear to be limited to constitutional issues. *The Supreme Court's resulting direct appellate jurisdiction under 1973c appears equally unrestricted.*" Robert L. Stern and Eugene Gressman, *Supreme Court Practice* (5th ed. 1978) p. 22-23. (emphasis added.)

The Solicitor General's argument that a denial of summary judgment is not final and hence unappealable entirely misses the mark. In *NAACP* v. *New York*, the Court painstakingly distinguished Section 4, and concomitantly the jurisdictionally identical Section 5, from other three-judge court statutes which do in fact require a final judgment.

> Congress . . . provided in that [the Voting Rights] Act that "any appeal" in a § 4(a) three-judge proceeding shall be to this Court. This contrasts with the language in the earlier theretofore existing statute providing for an appeal here only "from the final judgment" of the three-judge court. § 1972(g). 413 U.S. at 355.

Furthermore, the Solicitor General's suggestion, that absent final judgment only orders granting or denying injunctions under Section 5 are appealable, was considered and rejected by the Court in *NAACP* v. *New York*. The Court supported its broad reading of the Voting Rights Act provision by contrasting it with 28 U.S.C. § 1253. 413 U.S. at 356.

> Section 4(a) does not incorporate or refer to § 1253. The former relates to "any appeal;" the latter speaks only of "any party." The difference is obvious and the broader purport of Congress under § 4(a) is manifest.

B. For the proposition that "this Court has recognized that a denial of a motion for summary judgment is generally not a final order for purpose of appeal" the Solicitor General cites *Switzerland Cheese Association, Inc.* v. *Horne's Market, Inc.*, 385 U.S. 23 (1966). (Motion to Dismiss, at 5). Whatever merit the argument may have, that such an appeal under Section 5 must be dismissed for lack of finality, it is clearly inapplicable to the present case. In *Switzerland Cheese*, the Court specifical-

ly stated that a summary judgment motion denied on the grounds that there exist "unresolved issues of fact" is generally unappealable because such an order "does not settle or even tentatively decide anything about the merits of the claim." 385 U.S. at 25.

In the present case, however, the State moved for summary judgment on the issue of effect, in order to resolve a fundamental question of law. That legal issue must be determined before the state, the party with the burden of proof, can formulate its case. The district court's order does not, as in *Switzerland Cheese*, merely rule that the case should go to trial, it fashions a new legal standard by which to evaluate impermissible effect under Section 5 of the Voting Rights Act.

The implementation of Congress' intent that Section 5 litigation be expeditious and uniform, requires that the governing legal standards be determined prior to trial. Should the Court decide this case in favor of the state, trial on the issue of impermissible effect will be unnecessary. The plain language of Section 5 and judicial economy argue for the disposition of this issue by the Supreme Court prior to trial.

CONCLUSION

For these reasons, this Court should deny the Appellees' Motions to Dismiss and enter an order noting probably jurisdiction of this appeal.

Respectfully submitted,

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